



General Assembly

Distr.
LIMITED

A/CN.4/L.554/Add.2
11 August 1998

ORIGINAL: ENGLISH

INTERNATIONAL LAW COMMISSION
Fiftieth session
Geneva, 20 April-12 June 1998
New York, 27 July-14 August 1998

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

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Chapter VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES

Addendum

- C. Draft articles provisionally adopted by the Commission on
first reading (continued)

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Article 13

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 10. The request shall be accompanied by a documented explanation setting forth its grounds.
2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 10, it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 11.
3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months, unless otherwise agreed.

Commentary

- (1) Article 13 addresses the situation in which a State, although it has received no notification about an activity in accordance with article 10 becomes aware that an activity is being carried out in another State, either by the State itself or by a private entity, and believes, on reasonable grounds, that the activity carries a risk of causing it significant harm.
- (2) The expression "a State" is not intended to exclude the possibility that more than one State could entertain the belief that a planned activity could adversely affect them in a significant way. The words "apply the provision of article 10" should not be taken as suggesting that the State which intends to authorize or has authorized an activity has necessarily failed to comply with its obligations under article 10. In other words, that State may have made an assessment of the potential of the planned activity for causing significant transboundary harm and concluded in good faith that no such effects would result therefrom. Paragraph 1 allows a State to request that the State of origin of the activity take a "second look" at its assessment and conclusion, and does not prejudge the question whether the State of origin initially complied with its obligations under article 10.
- (3) In order for the State likely to be affected to be entitled to make such a request, however, two conditions must be satisfied. The first is that the requesting State must have "reasonable grounds to believe" that the activity in question may have a risk of causing significant transboundary harm. The second is that the requesting State must provide a "documented explanation setting forth its grounds". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A

serious and substantiated belief is necessary, particularly in view of the possibility that the State of origin may be required to suspend implementation of its plans under paragraph 3 of article 13.

(4) The first sentence of paragraph 2 deals with the case in which the planning State concludes, after taking a "second look" as described in paragraph (2) of the present commentary, that it is not under an obligation to provide a notification under article 10. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the State of origin to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the State of origin does not satisfy the requesting State. It requires that, in such a situation, the State of origin promptly enter into consultations with the other State (or States), at the request of the latter. The consultations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 11. In other words, their purpose is to achieve "acceptable solutions" regarding measures to be adopted in order to prevent, or to minimize, the risk of causing significant transboundary harm, and that the solutions to be sought should be "based on an equitable balance of interests". These phrases are discussed in the commentary to article 11.

(5) Paragraph 3 requires the State of origin to introduce appropriate and feasible measures to minimize the risk and where appropriate, to suspend the activity in question for a period of six months if it is requested to do so by the other State during the course of consultations. States concerned could also agree otherwise.

(6) Similar provisions have been provided for in other legal instruments. Article 18 of the Convention on the Law of the Non-Navigational Uses of International Watercourses,⁶⁰ and article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context⁶¹ also contemplate a procedure by which a State likely to be affected by an activity can initiate consultations with the State of origin.

Article 14

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, or minimizing the risk of causing, significant transboundary harm.

⁶⁰ General Assembly resolution 51/229 of 21 May 1997, annex.

⁶¹ Supra note 8.

Commentary

(1) Article 14 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is the same as previous articles, viz., to prevent, or to minimize the risk of causing, significant transboundary harm.

(2) Article 14 requires the State of origin and the likely affected States to exchange information regarding the activity after it has been undertaken. In the view of the Commission, preventing, and minimizing the risk of, transboundary harm based on the concept of due diligence are not a once-and-for-all effort; they require continuing efforts. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 14, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States.⁶² In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

⁶² For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources, International Legal Materials, vol. 13, p. 352; article 4 of the Vienna Convention for the Protection of the Ozone Layer, *ibid.*, vol. 26, p. 1529; and article 200 of the United Nations Convention on the Law of the Sea, supra note 4, speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-Range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the States parties, International Legal Materials, vol. 18, p. 1442. Examples are found in other conventions such as article VI, para. 1 (iii), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, supra note 7; article 17 of the United Nations Convention on Biological Diversity, supra note 29; and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, supra note 10.

(5) Article 14 requires that such information should be exchanged in a timely manner. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 14 comes into operation only when States have any information which is relevant to preventing, or minimizing the risk of transboundary harm.

Article 15

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Commentary

(1) Article 15 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 9, 10 and 14. In the view of the Commission, States should not be obligated to disclose information that is vital to their national security or is considered an industrial secret. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the Convention on the Law of the Non-Navigational Uses of International Watercourses⁶³ also provides for a similar exception to the requirement of disclosure of information vital to national defence or security.

(2) Article 15 includes industrial secrets in addition to national security. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected even under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes⁶⁴ and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a

⁶³ Supra note 60.

⁶⁴ Supra note 10.

Transboundary Context⁶⁵ provide for similar protection of industrial and commercial secrecy.

(3) Article 15 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It, therefore, requires the State of origin that is withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as can be provided under the circumstances. The words "as much information as can be provided" include, for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to the conditions invoked for withholding the information. Article 15 relies on the good faith cooperation of the parties.

Article 16

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Commentary

(1) This article sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the injury might occur.

(2) Article 16 contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the injury might occur. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who might suffer significant transboundary harm as a result of activities referred to in article 1 should, regardless of where the harm might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of possible domestic harm. This obligation does not intend to affect the existing practice in some States of requiring that non-residents or aliens post a bond as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal system".

(3) Article 16 also provides that the State of origin may not discriminate on the basis of the place where the damage might occur. In other words, if

⁶⁵ Supra note 8.

significant harm may be caused in State A as a result of an activity referred to in article 1 in State B, State B may not bar an action on the grounds that the harm would occur outside its jurisdiction. This provision is also intended to cover damage likely to occur to persons without identity papers or passports, as well as indigenous people or kinship groups.

(4) This rule is residual, as indicated by the phrase "unless the States concerned have agreed otherwise". Accordingly, States concerned may agree on the best means of providing protection or redress to persons who may suffer a significant harm, for example through a bilateral agreement. States concerned are encouraged under the present draft articles to agree on a special regime dealing with activities with the risk of significant transboundary harm. In such arrangements, States may also provide for ways and means of protecting the interests of the persons concerned in case of significant transboundary harm. The phrase "for the protection of the interest of persons" has been used to make it clear that the article is not intended to suggest that States can decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. The purpose of the inter-State agreement should always be the protection of the interests of the victims of the harm.

(5) Precedents for the obligation contained in this article may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 provides as follows:

"Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court of the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

"The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out."⁶⁶

⁶⁶ Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974, art. 3, United Nations, Treaty Series, vol. 1092, p. 279, reprinted in International Legal Materials, vol. XIII, 1974, p. 591. Similar provisions may be found in article 2, paragraph 6, of the ECE Convention on environmental impact assessment in a transboundary context, of 25 February 1991, document E/ECE/1250; the Guidelines on responsibility and liability regarding transboundary water pollution, part II.B.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution, document ENVWA/R.45, 20 November 1990; and the Draft ECE Charter on environmental rights and obligations, paragraph 6, prepared at a meeting of

The Council of the Organization of Economic Cooperation and Development (OECD) has adopted a Recommendation on Implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4 (a) of that Recommendation provides as follows:

"Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status... ." ⁶⁷

Article 17

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.
2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

Commentary

(1) Article 17 provides a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the present draft articles. The rule is residual in nature and applies where the States concerned do not have an applicable agreement for the settlement of such disputes.

(2) It is assumed that the application of this article would come into play only after States concerned have exhausted all the means of persuasion at their disposal through appropriate consultation and negotiations. These could take

experts on environmental law, 25 February-1 March 1991, document ENVWA/R.38, annex I.

⁶⁷ OECD document C(77)28 (Final), annex, in OECD, OECD and the Environment, 1986, p. 150. To the same effect is principle 14 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, approved in decision 6/14 of the Governing Council of the United Nations Environment Programme (UNEP) of 19 May 1978. A discussion of the principle of equal access may be found in Van Hoogstraten, Environmental Policy and Law, vol. 2, 1976, 77.

place as a result of the obligations imposed by the present draft articles or otherwise in the normal course of inter-State relations.

(3) Failing any agreement through consultation and negotiation, the neighbouring States are urged to continue to exert efforts to settle their dispute, through other peaceful means of settlement to which they may resort by mutual agreement such as mediation, good offices, conciliation, arbitration or judicial settlement. These are means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations, in the second paragraph of the relevant section of the Friendly Relations Declaration⁶⁸ and in paragraph 5 of section I of the Manila Declaration,⁶⁹ which are open to States as free choices to be mutually agreed upon.⁷⁰

(4) If the States concerned are unable to reach an agreement on any of the means of peaceful settlement of disputes within a period of six months, paragraph 2 of article 17 obliges States, at the request of one of them, to have recourse to the appointment of an independent and impartial fact-finding commission. This is a compulsory procedure prescribed which, in the opinion of the Commission, is useful and necessary to help States to resolve their disputes expeditiously on the basis of an objective identification and evaluation of facts. Lack of proper appreciation of the facts is often at the root of differences or disputes among States.

(5) Inquiry or resort to independent or impartial fact-finding commissions is a well-known method incorporated in a number of bilateral or multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain Specialized Agencies and other international organizations within the United Nations system. Its potential to contribute to the prevention of international disputes is recognised by General Assembly resolution 1967 (XVIII) of 16 December 1963 on the "Question of methods of fact-finding".⁷¹

(6) By virtue of the mandate to investigate the facts and to clarify the questions in dispute, such commissions usually have the competence to arrange for hearings of the parties, examination of witnesses or on-site visits.

⁶⁸ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex.

⁶⁹ Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10, annex).

⁷⁰ For an analysis of the various means of peaceful settlement of disputes and references to relevant international instruments, see Handbook on the Peaceful Settlement of Disputes between States (United Nations publication, Sales No.: E.92.V.7).

⁷¹ Ibid., p. 25. See also the Declaration on Fact-Finding in the Field of the Maintenance of International Peace and Security (General Assembly resolution 46/59 (annex)).

(7) The report of the Commission usually should identify or clarify "facts". Insofar as they involve no assessment or evaluation, they are generally beyond further contention. States concerned are still free to give such weight as they deem appropriate to these "facts" in arriving at a resolution of the dispute. However, article 17 requires States concerned to give the report of the fact-finding commission a good-faith consideration at the least.

(8) The requirement of "good faith" was elaborated by the International Court of Justice in the North Sea Continental Shelf case between Denmark and the Federal Republic of Germany. In implementing this principle, it stated that the parties to the dispute "are under an obligation to conduct themselves so that the negotiations are meaningful, which will not be the case when either of them insist upon its own position without contemplating any modification of it".⁷²

(9) Article 17 is not self-executory. It requires further elaboration, by way of an annex, on the manner and means of the constitution and functioning of the fact-finding commission. States accepting article 17 could elaborate the procedure concerning the constitution of such a Commission by special agreement. Any future convention incorporating the regime of prevention could also provide the necessary elaboration. One model for this purpose exists in article 33 of the Convention on the Non-Navigational Uses of International Watercourses.⁷³

⁷² International Court of Justice Report 1969, p. 3, p. 47, para. 85. See also the case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), International Court of Justice, 25 September 1997, p. 62, para. 141.

⁷³ Supra, note 60.